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JOHN T. FEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 733

McCLATCHY BROADCASTING COMPANY, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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PETITION FOR REHEARING

As previously indicated, this case is of tremendous significance to the entire broadcasting industry. In fact, the question presented by petitioner is undoubtedly one of the most important issues in the field of communications law presented to this Court in the past decade. If left standing, the decision below will adversely affect every licensee of every radio and television broadcasting station in the country, every newspaper publisher, and every individual in any way associated with any media of mass communication. Under the agency policy approved in this case, any existing broadcast licensee, when applying to the Fed-

eral Communications Commission for additional facilities, and any individual or corporation connected with the business of newspaper publishing, when applying to the Commission for even an initial broadcast license, will be subjected to the possibility of automatic defeat without regard to demonstrable superiorities for the public interest.

Perhaps of even greater importance, the decision below has far reaching ramifications which are clearly detrimental to the entire radio listening and television viewing public of the country. It approves a grant of a broadcast license by the Federal Communications Commission to the inferior of two competing applicants, to the detriment of the public.

Over a period of years, the Commission has gradually developed and expanded its so-called policy of diversification of the media of mass communication to the end that now that policy can be employed by itself to defeat an otherwise superior applicant in a comparative proceeding for a broadcast facility. The instant case makes clear for the first time the danger inherent in the application of this policy. It has become the instrument of caprice and abuse of discretion, and could be so used, as sanctioned by the court below, in every radio or television hearing involving an applicant associated with other mass-media. This Court now has an opportunity to pass on the validity of this sweeping and discriminatory policy, which, standing alone, is wholly unrelated to the public interest, convenience or necessity. It is because of the extreme importance of this issue, both to the industry and to the public in general, that petitioner feels a petition for rehearing is indicated.

The only real basis for the briefs in opposition filed by the Commission and Telecasters was that petitioner had misconceived the question, in that the issue raised is not, in fact, presented by the case. This is erroneous, and the denial of certiorari by this Court will result in the perpetuation of a fundamental error made by the court below when it decided the case upon a question not presented by the facts and the decision of the Commission. If petitioner's statement of the question had been accepted, the court below would have been required either to rule in favor of petitioner, or declare outright that a television applicant could be discriminated against solely because it was the owner of newspapers.*

In view of the position assumed by the Commission and Telecasters in opposition to the petition for certiorari, it was incumbent upon petitioner to file a reply brief. Such a brief was filed on Wednesday, March 20, 1957, to the end that the arguments in opposition would be dispelled. On the following Monday, March 25, 1957, the petition for certiorari was denied. Accordingly, it appears that this case was considered by the Court at its conference of Friday, March 22, 1957—less than two full days following the filing of the reply brief. Were it not for the fact that the case is patently of national importance, and were it not for the additional fact that, in view of the briefs in opposition, the reply brief assumed increased significance, petitioner would have rested with the Court's order of

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* This, of course, would have been directly contrary to the Court of Appeals' decision in *Stahlman* v. *Federal Communications Commission*, 75 U.S. App. D.C. 176, 126 F. 2d 124 (1942). If the decision here is left standing, the *Stahlman* case will have been impliedly overruled and legal sanction will have been given to unconstitutional discrimination.

March 25, 1957. However, under the circumstances, it is respectfully urged that the petition for certiorari be reconsidered in the light of the reply brief.

Still another circumstance looms large. The Court's order of March 25, 1957, noted that the Chief Justice did not participate in the consideration and decision of the petition. Petitioner, of course, does not argue with the Chief Justice's disqualification of himself. However, that fact resulted in a Court composed of only seven Justices for consideration of the certiorari petition, since one vacancy on the Court then existed. In the interim—in fact, on the same day the petition for certiorari was denied—Mr. Justice Wittaker filled the vacancy created by Mr. Justice Reed. Therefore, again in view of the tremendous importance of the question presented, it is urged that rehearing be granted so that the present full Court may have an opportunity to consider this case.

It is inconceivable that this Court will refuse to review a case in which the Federal Communcations Commission, with the sanction of the Court of Appeals, has done the very thing it told Congress it had no power to do, namely, discriminate against an applicant solely on the ground that such applicant was engaged in a particular line of business, thus abusing its power and acting against the public interest.

For the foregoing reasons, it is respectfully submitted that a petition for writ of certiorari to the

United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

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FEDERAL COMMUNICATIONS COMMISSION, *Respondent.*

BRIEF OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, AS AMICUS CURIAE, IN SUPPORT OF PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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OPINIONS BELOW

The original opinion of the Court of Appeals (R. 341, P. App. 1) is reported at 239 F. 2d 15 and the opinion of the Court of Appeals on rehearing (R. 351, P. App. 9) is reported at 239 F. 2d 19.[1]

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[1] The Initial Decision of the Examiner (R. 15) is unreported. The Decision of the Federal Communications Commission (R. 55) is unofficially reported at 9 Pike & Fischer R. R. 1190.

JURISDICTION

The original judgment of the Court of Appeals was entered on January 27, 1956. A timely petition for rehearing was granted on May 10, 1956, and on the same date the original judgment was vacated. (R. 350) Following rehearing, the judgment of the Court of Appeals was entered on November 1, 1956. (R. 361, P. App. 18) The jurisdiction of this Court is invoked by Petitioner under 28 U.S.C. § 1254(1).

INTEREST OF THE AMICUS CURIAE

The American Newspaper Publishers Association is a membership corporation organized and existing under the laws of the State of New York. Its membership embraces publishers of more than 800 daily and/or Sunday newspapers, all of whom are vitally interested in an issue presented in this case by the decision of the Court below.

This Amicus Curiae, through the submission of its brief herein, supports the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to the end that that Court's decision, affirming an order of the Federal Communications Commission based upon a policy of the Commission singling out newspapers or persons associated with newspapers as a special class for discriminatory treatment in contested proceedings before that body, be reviewed.

In submitting its brief, this Amicus Curiae does not seek to persuade this Court to review the decision below for the purpose of obtaining a decision placing persons engaged in the newspaper publishing business or associated therewith in a preferred position. What it

seeks by supporting the petition is a review of the decision below, because that decision is in conflict with the principles heretofore enunciated by this Court that (a) the entire field of radio broadcasting is open on equal terms to all persons except those specifically disqualified by the Act and (b) the public interest and convenience require the granting of a license or a construction permit, as the case may be, to that applicant who demonstrates its ability to render the best practicable service to the community reached by its broadcasts.

This Amicus filed a brief as Amicus Curiae in the Court below on the original hearing and a memorandum in support of Petitioner's petition for rehearing.

QUESTION PRESENTED

The question presented is stated by Petitioner thus:

> Whether the Federal Communications Commission, after a comparative hearing between two competing applicants for a television station, has the power to award the grant to one applicant on the sole ground that the other applicant has newspaper and broadcasting interests in the area involved.

In addition, this Amicus submits that the diversification policy of the Commission, as construed and upheld by the Court below, is discriminatory, per se, and, therefore, unlawful because it exceeds the statutory authority conferred and in a manner repugnant to the Fifth Amendment.

CONSTITUTIONAL PROVISION INVOLVED
FIFTH AMENDMENT

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in

cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

In addition to the provisions of the Communications Act of 1934, as amended, cited by Petitioner, (P. App. D. 19) this Amicus also cites Sec. 402(h) of said Act:

> "(h) In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined."

LEGISLATIVE HISTORY

The narration of the Legislative History of the Communications Act presented by Petitioner in Appendix E of P. App., pages 20-53, inclusive, is incorporated herein by reference.

ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION

The orders of the Federal Communications Commission set forth by Petitioner in Appendix F of P. App., pages 53-58, inclusive, are incorporated herein by reference.

STATEMENT OF THE CASE

In the interest of brevity, the Amicus Curiae incorporates by reference herein the statement of the case as set forth in the brief of the Petitioner herein. For the information of the Court, however, a statement of the historical background of the controversy is submitted. This statement will deal (a) with the development of the conflict over newspaper ownership of radio and television stations, (b) with the genesis of the Federal Communications Commission policy of "diversification" of ownership and its development into a policy of outright preference for non-newspaper applicants over newspaper applicants, and (c) with petitioner's record of outstanding service of approximately a century in the newspaper field and more than one-third of a century in the broadcasting field.

HISTORICAL BACKGROUND

(a) Broadcasting emerged from the laboratory stage early in the nineteen twenties, television approximately two decades later. At the time of broadcasting's emergence, Congress had not given consideration to the myriad problems that shortly developed in respect of its regulation under the Commerce Clause. For several years, the Department of Commerce sought to establish an orderly control of the business through the issuance of licenses to broadcasters under the Act of 1912 regulating short wave communications services. In 1926, this effort by the Department was terminated by the decision of the District Court of the United States for the Northern District of Illinois in the case of *United States* v. *Zenith Radio Corporation,* 12 F. 2d, 614.

In the period prior to 1926 some newspapers, either directly or through persons associated with them or affiliates, pioneered in rendering broadcast service. On February 2, 1922, Petitioner herein was licensed to operate the first newspaper-owned broadcast station on the Pacific Coast (R. 77).

In 1927, Congress enacted a law regulating broadcasting and in 1934 Congress supplanted this Act with the Federal Communications Act of 1934, which Act with amendments made thereto from time to time is now in effect.

With the rapid development of broadcasting in the late twenties and early thirties, newspapers applied for and obtained numerous licenses. As the field began to fill up, there were numerous contested proceedings before the Federal Communications Commission, and, in the late thirties, the question of newspaper ownership being in the public interest was first presented in a contested case. *Tri State Broadcasting Company, Inc.* v. *Federal Communications Commission,* 96 F. 2d, 564 (1938).

That case held, as the Court below said in the *Stahlman* case, *infra,* there was "nothing in the Act which either prevents or *prejudices* the right of a newspaper, as such, to apply for and receive a license to operate a radio broadcast station." (Emphasis supplied) 126 F. 2d at 127.

In 1940, in another case involving a newspaper, *Federal Communications Commission* v. *Sanders Brothers Radio Station,* 309 U.S. 470-478, this Court announced the principles set forth in the statement of "Interest of the Amicus Curiae" *supra,* namely, that the entire field of radio broadcasting is open on equal

terms to all persons except those specifically disqualified by the Act and that the public interest and convenience *require* the granting of a license or construction permit, as the case may be, to that applicant who demonstrates its ability to render the best practicable service to the community reached by its broadcasts.

At no time since that decision has Congress amended the Act to disqualify newspapers or persons associated with newspapers from receiving a license or a construction permit. Nor has it empowered the Commisson to deviate from the standard requiring it to grant a license or a construction permit to the applicant in a contested proceeding who demonstrates its ability to render the best practicable service to the community reached by its broadcasts.

(b) The controversy over newspaper ownership of stations was not terminated by the *Sanders* case. Rather, it increased and in 1941 the Federal Communications Commission promulgated Orders 79 and 79A for the avowed purpose of determining what statement of policy or rules, if any, should be issued concerning applications with which are associated persons associated with one or more newspapers, as well as what statements of policy or rules, if any, should be issued concerning future acquisition of stations by newspapers. (Order No. 79A, July 1, 1941, P. App. F. pages 55-56).

Hearings were held by the Commission pursuant to Orders 79 and 79A and in due course the Commission's authority to issue any rules or statement of policy with specific discriminatory reference to newspapers or persons associated with newspapers was challenged

in the Court below in *Stahlman* v. *Federal Communications Commission,* 126 F. 2d 124 (1942). That Court, relying upon the *Sanders* case, *supra,* held that the Commission was without authority even "by implication" to put a ban on newspapers as such.

Notwithstanding the decision in the *Stahlman* case, the Commission, on January 13, 1944, issued a notice in which it announced a policy of "diversification". (P. App. F. pages 57-58).

In its notice the Commission said, inter alia:

> "The Commission has concluded, in the light of the record in this proceeding and of the grave legal and policy questions involved, not to adopt any general rule with respect to newspaper ownership of radio stations.
>
> * * * * *
>
> "Aside from the specific question of common ownership of newspapers and radio stations, *the Commission recognizes the serious problem involved* in the broader field of the control of the media of mass communications *and the importance of avoiding monopoly of the avenues of communicating fact and opinion to the public.* All the Commissioners agree to the general principle that diversification of control of such media is desirable. The Commission does not desire to discourage legally qualified persons from applying for licenses, but does desire to encourage the maximum number of qualified persons to enter the field of mass communications, and to permit them to use all modern inventions and improvements in the art to insure good public service. . . ." (Emphasis supplied.)

At various times since 1944, Congress has inquired into the application of the diversification policy by

the Commission and on each of these occasions the Commission has assured Congress that it was not using that policy for the purpose of discriminating against newspaper applicants. For a more complete consideration of the Congressional proposals, hearings thereon, and statements made to the committees of Congress by representatives of the Commission, reference is made to the legislative history set out by Petitioner in the Appendix E to its brief, pages 20-53.

The attention of this Court is respectfully directed to that legislative history.

In the period between 1941, when Orders 79 and 79A were issued, and 1948, tremendous strides were made in the art of television.

As a result of these advances in the art, many holders of licenses for standard (AM) and frequency modulation (FM) stations began to pioneer in the television field. A majority of the grants made to applicants for television construction permits were to experienced broadcasters, many of whom had newspaper affiliations. These grants made prior to 1948 were largely after consideration by the Commission of uncontested applications.

By 1948, the Commission found itself in such a maze of administrative problems incident to providing proper television service for the public that it decided to take time out for an overall study of its problems. It suspended consideration of all pending applications for construction permits for a period of almost four years. Included among the applications put on the shelf was that of Petitioner herein which was originally filed May 7, 1948. This period from 1948 to 1952 has now become known as the freeze period.

In the great majority of the contested cases decided since 1952, in which there were newspapers or persons associated with newspapers in an applicant group, the Commission has invoked its diversification policy in order to render a decision against the applicant owned by or associated with a newspaper.[2]

With the greatly expanded interest in television since 1948, the Commission has in turn expanded its views on diversification to the extent it now says that in contested proceedings it prefers "non-newspaper applicants over newspaper applicants and newcomers to the field over existing licensees." (R. 115)

(c) In 1849, James McClatchy, an Irish immigrant, arrived in the then village of Sacramento, California, and engaged in newspaper work. In 1857, or but seven years after California was admitted to the Union, he founded the Sacramento Bee, which from that date down to the present has been regarded as one of the foremost newspapers of this country,—foremost in that it has always maintained a vigorous independence in its editorial columns, combined with factual objectivity in its news columns, and devoted to the welfare of the people of Sacramento, the Sacramento Valley, the State of California and the nation.

From its founding in 1857 to the present, the Sacramento Bee has always been owned by and its directing head has always been a McClatchy, resident of Sacramento.

Over the span of years, the McClatchy interests have acquired two other newspapers in the Sacramento

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[2] See "Diversification: Its Case History" in the magizine, "Broadcasting-Telecasting", November 1, 1954.

Valley, the Fresno Bee and the Modesto Bee. The same policies of editorial independence and news objectivity that prevailed in the operation of the Sacramento Bee have prevailed in the conduct of these newspapers.

Since the very early days of the art of broadcasting, the McClatchy interests have been engaged in that field. Their first station was established on February 2, 1922, at Sacramento, or more than five years prior to the enactment of the Federal Radio Act of 1927, by the terms of which the Federal government was vested with authority over those engaged in the field of broadcasting.

In their conduct of their radio operations, the McClatchys have been guided by the same high ideals of public service that had marked the conduct of their newspaper business prior to 1922 and have marked it since.

The decision of the Commission, as affirmed by the Court below, specifically found that the operations of Petitioner over the years have,

> ". . . shown a high regard for the needs of the area they serve."

and that Petitioner's proposed television station

> "would be operated in the same excellent manner —aware of its responsibilities and abiding by its public trust." (R. 110)

As against this, the Commission, in its decision affirmed below, found that "Telecasters (successful below) has no record to assay." (R. 110).

Yet, notwithstanding this finding, the Commission denied the application of Petitioner and granted the application of the applicant who had no record to assay and the Court below affirmed.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below in affirming the Commission's decision which was based upon the latter's admitted policy of preferring "non-newspaper applicants and newcomers to the field over existing licensees" is in conflict with the holding of this Court that the public interest and convenience require the granting of a license or a construction permit, as the case may be, to that applicant who demonstrates its ability to render the best practicable service to the community reached by its broadcasts. Because of that conflict it should be reviewed by this Court.

In *Federal Communications Commission* v. *Sanders Brothers Radio Station,* 309 U.S. 470 (1940), this Court construed the standard of public interest and convenience as requiring the granting of an application to the applicant who demonstrates its ability to render the best practicable service to the community reached by its broadcasts. Since that decision Congress has not amended the provisions of the Act so as to permit the Commission to adopt a policy by which persons engaged in the newspaper business may by reason of that fact be differentiated as a class for the purpose either of preference or of prejudice in the assignment of radio facilities. Yet that is precisely what the Commission admits having done and the Court below, by its decision affirming the order of the Commission, has approved this administrative ex-

pansion of the policy laid down by Congress and in a manner repugnant to the Act.

2. The decision of the Court below violates Petitioner's rights as guaranteed by the Fifth Amendment to the Constitution of the United States. Because of that violation it should be reviewed by this Court.

Since the Act confers no power upon the Commission to adopt the policy of preference which it admittedly applied in this case, the decision of the Court below affirming the Commission's decision adverse to Petitioner constitutes an injurious discrimination in violation of the Fifth Amendment to the Constitution of the United States, *Currin* v. *Wallace,* 306 U.S. 1 (1939); *Grosjean* v. *American Press Co.,* 297 U.S. 233 (1936).

There is nothing in the Act which prejudices the right of a newspaper or persons associated with a newspaper, as such, to apply for and receive a license to operate a television station.

It need only be added under this Point 2 that the classification of applicants who are engaged in the newspaper publishing field for the purpose of differentiation from persons engaged in other fields results in injurious discrimination whether the result were to operate in favor of or against any such persons.

3. The decision of the Court below should be reviewed in order that Sec. 402 (h) of the Act may be given its proper application in this long drawn out controversy.

Upon the basis of the proceedings already had in this controversy and on the records now before this Court, Sec. 402 (h) should be invoked through the granting of the writ prayed for.

In addition to the petition herein, this Court has a companion case before it flowing out of the identical controversy,—*Sacramento Telecasters, Inc., Petitioner* v. *McClatchy Broadcasting Company,* No. 694, October Term, 1956.

These two cases demonstrate the extent to which the Commission went in order to implement its policy of preferring non-newspaper applicants over newspaper applicants and newcomers to the field over existing licensees in its consideration of mutually exclusive applications for construction permits for television stations.

Both were disposed of by the Court below in one opinion *McClatchy Broadcasting Company* v. *Federal Communications Commission,* 239 F. 2d 19 (1956) rendered upon the original appeal of Petitioner herein from the decision of the Commission in No. 694 and upon rehearing granted Petitioner in No. 733 herein.

As pointed out by the Court below, during the hearing before the Commission's examiner, Telecasters was permitted, over Petitioner's objection, to amend its application so as to provide coverage practically equal to that of Petitioner, thereby removing the coverage issue from the case. Then as the Court said,

> "After the hearing, the examiner's initial decision found McClatchy would better serve the public interest, but the Commission disagreed. It recognized McClatchy's outstanding record of public service in the newspaper and radio fields, but considered diversification of control of facilities for the dissemination of fact and opinion to be determinative. On the basis of that holding the Commission issued October 4, 1954, a television construction permit to Telecasters, a newcomer in the communications field without radio or newspaper connections." 239 F. 2d 21.

On November 26, 1954, Telecasters filed an application for modification of the construction permit issued less than 60 days before. It sought not only to change the transmitter site, but to decrease the height of the antenna. Without hearing, the Commission granted the application for modification and when Petitioner petitioned the Commission to stay the effectiveness of the modification and to designate for hearing Telecasters' application therefor, the Commission held that Petitioner had no standing under the Act to be heard. (P. App. B, pages 11-12).

These actions of the Commission were arbitrary and capricious, as well as injuriously discriminatory.

Petitioner appealed to the Court below and that Court consolidated its appeal for argument with the reargument of the case originally decided January 27, 1956. On October 18, 1956, the Court issued its opinion, wherein it affirmed the order in the original case, No. 733 now in this Court, and reversed and remanded the second case for further proceedings before the Commission (No. 694 now in this Court).

The Court below erred in not disposing of the controversy in its entirety and in failing to apply Sec. 402(h) to that end. In the light of its failure so to do, the petition to review should be granted.

CONCLUSION

WHEREFORE, It is respectfully submitted that for the reasons given Petitioner's petition for a writ of certiorari should be granted.

Respectfully,

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

By:

ELISHA HANSON
Its Attorney

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February 28, 1957